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In the Supreme Court of the United States

October Term, 1982

IN RE: CATHERINE DOAN
Petitioner

PETITION FOR A WRIT OF MANDAMUS OR IN THE ALTERNATIVE A WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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No.

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PETITION FOR A WRIT OF MANDAMUS OR IN THE ALTERNATIVE A WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Petitioner, Catherine Doan, moves that an order and rule be entered and issued directing the Honorable Constance Baker Motley, Chief Judge of the United States District Court for the Southern District of New York and the Honorable Burton R. Lifland, Bankruptcy Judge of the United States District of New York to show cause why a writ of mandamus or prohibition should not be issued against them in accordance with the prayer of said petition, and why Petitioner should not have such other and further relief on the premises as may be just and meet.

PARTIES AGAINST WHOM RELIEF IS SOUGHT

Petitioner, Catherine Doan, seeks relief from rules and orders issued by the Honorable Constance Baker Motley, Chief Judge, United States District Court for the Southern District of New York, and the Honorable Burton R. Lifland, Bankruptcy Judge for the Southern District of New York. Relief is not available in any other forum or court due to the nature of the present bankruptcy crisis and the arrogation of jurisdiction by the Respondents, Motley and Lifland, and others similarly situated.

JURISDICTION

Jurisdiction is predicated upon 28 U.S.C. §1651 and Rules 26 and 27 of the Rules of this Court. Issuance of the writ prayed for will be in aid of this Court's appellate jurisdiction by confining respondents and others similarly situated to the exercise of their lawful jurisdiction. *Ex parte Republic of Peru*, 318 U.S. 578 (1943); *Will v. United States*, 389 U.S. 90 (1966). The uncertainty regarding the nature of bankruptcy jurisdiction after *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ....., 102 S. Ct. 2858 (1982), ("*Marathon*") and in the absence of congressional action, has created exceptional circumstances which warrant the exercise of this Court's discretionary power so as to determine what, if any residuum of jurisdiction remains with the bankruptcy courts, and what, if any jurisdiction may be extant in the district courts over bankruptcy matters. There is no adequate remedy in any other form or forum due to the scope of the present crises and the unparalleled arrogation of power by the respondents and others similarly situated. *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Ex parte Fahey*, 332 U.S. 258 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies on the following:

United States Constitution, Article III, §§1 and 2;
United States Constitution, Tenth Amendment;
11 U.S.C. §362;
28 U.S.C. §1471(a), (b), and (c);
28 U.S.C. §1478;
28 U.S.C. §1481;
Pub.L. 95-598, Title IV, §401 (1978);

Pub.L. 95-598, Title IV, §404(a) (1978);
Pub.L. 95-598, Title IV, §405 (1978).

Due to the voluminous nature of the material relied upon, it is contained in the Appendix.

STATEMENT OF THE CASE

Petitioner's decedent initiated a personal injury action on February 5, 1980 in the Cuyahoga County, Ohio, Court of Common Pleas, naming fifteen (15) defendants, among them Johns-Manville Sales Corporation, a wholly-owned subsidiary of Manville Corporation (Manville). The complaint was subsequently amended to one for wrongful death.

On August 26, 1982, Manville and its subsidiary companies filed for Chapter XI Reorganization in the Southern District of New York (Appendix "A"). These cases were assigned to Respondent Lifland. Pursuant to 11 U.S.C. §362 Respondent Lifland entered a Restraining Order (Appendix "B"). This order resulted in petitioner's case being stayed as to Manville which was then severed as a party (Appendix "C"). On January 10, 1983, Respondent Lifland reasserted the validity of the stay and Restraining Order apparently under authority of an "Emergency Rule" adopted by Respondent Motley (Appendices "D" and "E")

The judgment of this Court in *Marathon* having become effective December 24, 1982, Petitioner moved Cuyahoga County Common Pleas Court for an order dissolving its stay and setting a date for trial against Manville (Appendix "F"). An order to show cause with temporary restraining order was issued by Respondent Lifland based on authority granted by the Emergency Rule adopted by Respondent Motley in her capacity as Chief Judge of the District Court (Appendix "G").

REASONS FOR GRANTING THE WRIT

I. RESPONDENT LIFLAND'S ACTIONS ARE IN DIRECT CONTRAVENTION OF THE HOLDING OF THIS COURT IN MARATHON

In *Marathon* a majority of this Court consisting of a plurality of four justices with the concurrence of two additional justices, determined 11 U.S.C. §1471(c) to be an unconstitutional grant of jurisdiction because bankruptcy judges are not afforded status under Article III of the Constitution. Further, the majority held that the impermissible grant of jurisdiction to the bankruptcy judges found at 28 U.S.C. §1471(c) was not severable from the remainder of the statute, 28 U.S.C. §1471(a) and (b). There is, therefore, no jurisdiction in *any* court to determine bankruptcy matters.[1]

Respondents, Motley and Lifland, are proceeding as if 28 U.S.C. §1471(a) and (b) were not affected by *Marathon,* and that only so much of 28 U.S.C. §1471(c) as directed bankruptcy courts to exercise §1471(b) jurisdiction was invalidated. This construction conflicts with the plurality of *Marathon* which recognized that the initial jurisdictional grants in §1471(a) and (b) were vested in the bankruptcy court by §1471(c). The Respondents' actions are also violative of the express intent of Congress to give all authority to pass on bankruptcy matters to the bankruptcy court. *See, H.R. Rep.* No. 95-595, 95th Cong., 1st Sess. 14-15 (1977).

The plurality indicated that the gravamen of the constitutional infirmity was the authority granted Article I

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1. Even a narrow reading of *Marathon* indicates that no jurisdiction exists in any court to determine common law claims such as those asserted by Petitioner in the state courts of Ohio.

judges to determine disputes over "private rights" or "rights created by state law." Petitioner seeks to assert her rights as created and defined by the law of the State of Ohio. Respondents would, and have, prevented her assertion of state created rights by enforcement of the stay issued pursuant to 11 U.S.C. §362(a). As such, Respondents have arrogated unto themselves the express power this Court sought to deny them. *In the Matter of the Schear Realty & Investment Co., Inc.*, ... B.C.D. ..... (Bktcy. S.D. Ohio 1982) (Appendix "H").

II. THE EMERGENCY RULE ADOPTED BY RESPONDENT MOTLEY WHICH PERMITS RESPONDENT LIFLAND TO "EXERCISE" JURISDICTION IS UNCONSTITUTIONAL AND VOID

The Emergency Rule adopted by Respondent Motley under which Respondent Lifland is purportedly operating is subject to the same constitutional infirmities found objectionable in §1471(c). The Rule reinstates the same summary-plenary grant found in §1471, and is based on the assumption that bankruptcy jurisdiction reverted to the district courts under §1471(a) and (b).[2]

This position is untenable. The *Marathon* majority stated that all of §1471 was invalid, not just §1471(c). Section 1471(c) stated that bankruptcy courts *shall* exercise all of the jurisdiction granted to the exclusion of the district courts. There is no residual original jurisdiction left in

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2. The Administrative Office of the United States Courts by memorandum of 27 September, 1982 stated:

> *Marathon* does not cause a jurisdictional lapse. The Administrative Office concludes that *Marathon* did not invalidate 11 (sic) U.S.C. Sections 1471(a), (b). In addition, Sections 404 and 405 of the 1978 Act also vest bankruptcy powers in the district courts as 'courts of bankruptcy' until 1984.

the district court which would permit Respondent Motley to delegate pursuant to the Emergency Rule. This Court recognized in *Marathon* that §1471 granted no original jurisdiction to the district court:

> In short, the 'adjunct' bankruptcy courts created by the Act exercise jurisdiction behind the *facade* of a grant to the district courts. . . *Marathon, supra* at 2879.

See also: *Schear Realty, supra; In re*: *Macon Uplands Venture*, 2 B.R. 435 (Bktcy. D. Md. 1979); *Anderson v. CBS, Inc., (In re*: *Trac Records*), 9 B.C.D. 1011 (Bktcy. N.D. Ga. 1982).

Respondent Motley cannot rely on §§404 and 405 of the 1978 Act to support the Emergency Rule. Section 404 provides that the courts of bankruptcy, as defined and created under the Bankruptcy Act of 1898, "shall continue through March 31, 1984, to be courts of bankruptcy for the purposes of this Act and the amendments made by this Act." 1978 Act, §404(a), 92 Stat. 2685 (1978). Section 405 of the Act provides that the jurisdiction grant under §241 (28 U.S.C. §1471) "shall apply to the courts of bankruptcy continued by section 404(a) of this Act." 1978 Act, §405(b), 92 Stat. 2685 (1978). During transition, the courts of bankruptcy exercise a jurisdictional grant under §241 of the 1978 Act, not any jurisdictional grant under the Bankruptcy Act of 1898, which was repealed by §401 of the 1978 Act. 1978 Act, §401, 92 Stat. 2685 (1978). *Anderson, supra.*

Respondent Motley cannot rely on 28 U.S.C. §1331 for jurisdiction or to support the Emergency Rule. Federal question jurisdiction was not intended to encompass bankruptcy claims. Every bankruptcy law enacted has had an express jurisdictional grant. *See*: 5 Stat. 446; 14 Stat. 517; 30 Stat. 545, 552; 92 Stat. 2668.

Even if Respondents could rely on §1331 to sustain their exercise of jurisdiction, it could not encompass Petitioner's case, a case based on state common law. The Emergency Rule adopted by Respondent Motley purports to grant Respondent Lifland jurisdiction over civil proceedings "related to cases under Title 11." However, cases arising under Title 11 are not cases arising under the laws of the United States. A case arises under the law that creates the cause of action. *American Well Works Co. v. Lane & Bowler Co.*, 241 U.S. 257 (1916). Proceedings related to cases under Title 11 involve actions which arise under state law, not federal law. *See Chamberlain Livestock Auction, Inc. v. Aberdeen Production Credit Assn.*, 9 B.C.D. 783 (D. S.D. 1982).

Further, the pendent jurisdiction of the district court to consider non-federal claims is no basis for Respondents to assert jurisdiction over proceedings related to cases under Title 11, since pendent jurisdiction exists only where there is a federal claim of sufficient substance. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Accordingly, Respondent Motley does not have the jurisdiction over Petitioner's case as a related proceeding under 28 U.S.C. §1331, which she has attempted to delegate to Respondent Lifland under the Emergency Rule.

28 U.S.C. §1334 is insufficient to support the Emergency Rule and the delegation to Respondent Lifland. The statute conveys summary jurisdiction only. *Freidman v. Snelling*, 526 F.2d 1346 (1st Cir. 1975); *French and Polyclinic Medical School and Health Center, Inc. v. Associated Hosp. S. of N.Y.*, 387 F. Supp. 1359 (S.D. N.Y. 1973). Petitioner's suit does not fall within the summary jurisdiction as it does not involve property within the actual or constructive possession of the debtor but rather a tort suit against the debtor

The Emergency Rule is defective in its assumption that the district court can refer to the bankruptcy court its jurisdiction over civil proceedings "arising in or related to cases. . ." in bankruptcy. This delegation to an Article I court is precisely what this Court held the Congress was unable to do. It is inconceivable that the Respondent Motley can do by Rule that which Congress cannot accomplish by statute.[3] *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981).

III. THE STAY ENTERED AUGUST 26, 1982 BY RESPONDENT LIFLAND IS VOID AND UNENFORCEABLE

Upon filing for Chapter XI Reorganization Manville became the beneficiary of a stay order entered pursuant to 11 U.S.C. §362(a). This stay, renewed by Respondent Lifland by order dated January 10, 1983 is void and unenforceable.

As the plurality in *Marathon* indicated the comprehensive nature of the Bankruptcy Reform Act makes it impossible to invalidate a portion of the bankruptcy court's jurisdiction, while at the same time "leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims. . ." 102 S. Ct. at 2880 n.40. The stay provision is an integral part of that adjudicatory structure designed to protect the jurisdiction of the bankruptcy court. *Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island and Pacific Ry. Co.*, 294 U.S. 648 (1935).

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3. 11 U.S.C. §105 is an insufficient basis to enlarge jurisdiction. *Schear Realty, supra.* The mass reference by Respondent Motley does not meet the requirements of Fed. R. Civ. Pro. 53. *See also*: *LaBuy, supra.* The Emergency Rule also fails to meet the criteria of Fed. R. Civ. Pro. 83 in that it conflicts with Rule 53, and in any event does not authorize creation of subsidiary courts. *Miner v. Atlass*, 363 U.S. 641 (1960).

As Respondents have no subject matter jurisdiction to protect and preserve after *Marathon*, the purpose behind the automatic stay and the Restraining Order has been eliminated.

Alternatively, the 11 U.S.C. §362(a) stay is part and parcel of the single congressional design of creating a unified bankruptcy system, *S. Rep.* No. 95-1106, 95th Cong., 2nd Sess. 1 (1978). To the extent that the jurisdictional grant is invalid the stay provisions are likewise invalid. To paraphrase footnote 40 of the plurality: The Courts cannot conclude that if Congress were aware of the absence of bankruptcy courts' jurisdiction over state law cases, it would simply leave the adjudicatory structure of the stay provisions intact as to state law cases.

Respondents enforcing of the stay order is an unconstitutional intrusion upon powers reserved to the states in the Tenth Amendment. Petitioner's suit is a creature of Ohio common law, and as such, falls within the class of cases *Marathon* specifically prevents Respondents from exercising jurisdiction over.

The Tenth Amendment explicitly reserves to the states "the powers not delegated to the United States by the Constitution. . ." Federal courts have repeatedly recognized the exclusive powers granted to the states by the Tenth Amendment, identifying as an important constitutional policy the maintenance of "a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may *constitutionally* subtract from their authority." *Parker v. Brown*, 317 U.S. 341, 351 (1943) (emphasis supplied); *see also City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978). Because "the sovereignty of the States, within the boundaries reserved to them by the Constitution, is one of

the keystones upon which our government was founded and is of vital importance to its preservation," Respondents should be "quite properly, loathe to interfere" with that sovereignty. *National Association for the Advancement of Colored People v. Thompson*, 357 F.2d 831, 832-3 (5th Cir. 1966), *cert. denied*, 385 U.S. 820 (1966).

Respondent Lifland's enforcement and extension of the stay constitutes an exercise of jurisdiction unsupported by statute and therefore void. Respondent Lifland's enforcement and extension of the stay cannot be supported by the Emergency Rule adopted by Respondent Motley as that order is constitutionally infirm. Therefore, the continuing jurisdiction exercised by these Respondents, and others similarly situated, constitutes a usurpation of the legislative power and as such amenable to the writ prayed for. *Will v. United States, supra; DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1944); *McCullough v. Cosgrave*, 309 U.S. 634 (1939).

IV. ADEQUATE RELIEF IS UNAVAILABLE IN ANY OTHER FORM OR FORUM

Writs of mandamus and prohibition, albeit rare, are appropriately issued where, as here, inferior courts are disregarding this Court's mandates and questions of public importance are involved. They afford "an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction or compelling it to exercise its authority when it is its duty to do so." *Ex parte Republic of Peru, supra.*

In the case at bar, Respondent Lifland has made it abundantly clear that he will not recognize any restriction on his power but, rather, will abide by the Emergency Rule adopted by Respondent Motley, which Rule seeks to obviate the effect of *Marathon*. In such circumstances

the exercise by this Court of its discretion to issue extraordinary writs is required to prevent continued injustice. In the context of the Petitioner's case, it is one of thousands of toxic tort cases pending throughout the United States against Manville, all of which, and the respective rights of all of the litigants, are affected by *Marathon* and by the refusal of Respondents to obey this Court's mandate.

Beyond the Petitioner's case is the national chaos created by Congress' failure to enact remedial legislation and this Court's refusal to further stay its mandate in *Marathon*. All bankruptcy courts are operating under a cloud of jurisdictional uncertainty. Debtors and creditors alike are confused and perplexed as to their respective rights, privileges and liabilities. Every order of a bankruptcy court is suspect and the rights of all concerned are in jeopardy. In the Petitioner's case, as a prime example, the authority of the bankruptcy court to enforce the Automatic Stay and Restraining Order is in doubt; the validity of the removal of the asbestos cases to the bankruptcy courts is questionable; and the power of the bankruptcy court or the district court to evaluate the asbestos cases or to approve a reorganization affecting the claims of Manville's creditors, present and future, is uncertain. Only this Court's immediate intervention can provide appropriate sanctuary.

WHEREFORE, Petitioner prays:

1. That a writ of mandamus and prohibition issue from this Court to the Honorable Constance Baker Motley, Chief Judge for the United States District Court for the Southern District of New York and the Honorable Burton R. Lifland, Bankruptcy Judge for the Southern District of New York, to show cause on a day fixed by this Court why mandamus should not issue from this Court directing

them to obey this Court's mandate in *Marathon* and prohibiting them from disregarding said mandate by enforcing or attempting to enforce, under the aegis of the Emergency Rule, the Stay and the Restraining Order entered in Petitioner's case, and which writ should clearly and unequivocally define the scope of any remaining bankruptcy jurisdiction.

2. That Petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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